VOLUNTARY TRANSFERS OF CORPORATE UNDERTAKINGS

A CORPORATION, X, has sufficient liquid assets to meet its obligations as they mature, and is making large net profits. An offer is made by Y to purchase its assets. The directors, and the holders of a large majority of its stock, vote to accept the offer. Should a court, in a suit by a minority stockholder, enjoin the proposed transfer of assets?

Again. A corporation, X, formed in state R, has sufficient liquid assets to meet its obligations as they mature, and is making large net profits. But its business is being transacted chiefly in state S, and both R and S are collecting large sums in taxes from it. The directors, and the holders of a large majority of its stock, wish to form a corporation, Y, in state S and transfer the assets of X to Y. If a minority stockholder objects, is there any way in which such object may be accomplished?

I

It has been stated that, at the common law, a corporation could not be dissolved without the unanimous consent of its members. In attempting to decide the cases, put above, it is wise to inquire at once whether such statement is correct.

Two questions present themselves. First, did a corporation at common law have the capacity or power to dissolve itself by its voluntary action? It did not. But it did have, at common law, the capacity or power to surrender its corporate franchise, and when this surrender was accepted by the Crown (and duly enrolled) the corporation was dissolved.[1]

Second, by what human beings was the corporate power to surrender its franchise to be exercised? The powers of a corporation

[1] See BLACKSTONE, COMMENTARIES, Book I, c. XVIII. It was indeed questioned by counsel in Quo Warranto *v.* City of London (p. 92, Pollexfen *arguendo*) whether a corporation had such capacity; but there seems to be no doubt of the accuracy of Blackstone's statement. See 2 KYD, CORPORATIONS, 465; GRANT, CORPORATIONS, 306; LINDLEY, COMPANIES, 6 ed., 138.

are, at common law, vested in its members, and the decision of the majority of the members binds the minority and is the decision of the corporation. To be sure, different arrangements may be made in the charter or by-laws, or by statute, — on the one hand, it may be provided that certain corporate acts shall be done only when two thirds, or three fourths, or all the members agree; on the other hand, it may be provided that many or all the powers may be exercised by a committee of management. But we are speaking of the common law.

Thus Blackstone said that the incorporators are considered as one person in law, and

> "as one person, they have one will, which is collected from the sense of the majority of the individuals." [2]

And again:

> "In aggregate corporations also, the act of the major part is esteemed the act of the whole. By the civil law this major part must have consisted of two-thirds of the whole. . . . But, with us, *any* majority is sufficient to determine the act of the whole body. And whereas, notwithstanding the law stood thus, some founders of corporations have made statutes in derogation of the common law, making very frequently the unanimous assent of the society to be necessary to any corporate act (which King Henry VIII found to be a great obstruction to his projected scheme of obtaining a surrender of the lands of ecclesiastical corporations), it was therefore enacted by Statute 33 Hen. VIII, c. 27, that all private statutes shall be utterly void whereby any grant or election, made by the head, with the concurrence of the major part of the body, is liable to be obstructed by any one or more, being the minority." [3]

Kyd, in his "Treatise on the Law of Corporations," published in 1793, considered what would happen if "the acting part of the corporation" put the common seal to a deed of surrender, laid all the charters at the King's feet, and procured the surrender to be enrolled. He was of opinion that thereby the corporate existence would have been destroyed. And he makes this comment (italics ours):

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[2] COMMENTARIES, Book I, c. XVIII.

[3] COMMENTARIES, Book I, c. XVIII. For further authorities in support of the text, see GRANT, CORPORATIONS, 68 and cases cited; LINDLEY, COMPANIES, 6 ed., 435, 436 and cases cited.

"It would no doubt be a breach of trust in the acting part of the corporation to make such a surrender without the authority *of the major part of all the individual members*." [4]

It did not occur to Kyd to doubt the propriety of a surrender, authorized by the major part of the members.

Grant, in his "Treatise on the Law of Corporations," published in 1850, said [5] that incorporated persons can rid themselves of corporate character by surrendering their charter into the hands of the Crown, if such surrender be accepted, and there be due enrollment. He adds in a note:

"The surrender must be the act of the majority of the whole corporation, not merely of the governing body."

Adler, in his "Summary of the Law Relating to Corporations," published in 1903, said: [6]

"All corporations, with the exception of municipal corporations, may surrender their charters, and (though doubt has been expressed upon the point) the best opinion seems to be that a surrender needs only a resolution of the majority like any other corporate act."

The doubt on the point is traceable to the case of *Ward* v. *Society of Attornies*.[7] A society had been chartered, and the corporation had, for value received, issued shares, upon which dividends were expected to be declared. A majority of the members came to believe that it was more fitting that no profit should accrue to the members and voted (*a*) that the charter be surrendered, and (*b*) that, prior to the delivery of the deed of surrender, all the property of the corporation should be conveyed to trustees who should ultimately convey it to a new corporation so organized that the members would "not any longer possess any individual right of property in its capital or possessions, nor be entitled to derive any individual pecuniary advantages" from the revenues. A minority stockholder obtained a preliminary injunction against such transfer and surrender.

The majority were proposing to give away the assets of the corporation, thus making valueless the shares of the minority. It is plain that such an act could not be sanctioned.

The surrender of the charter was only to take place after the con-

[4] Vol. 2, p. 466. [5] Page 306. [6] Page 134. [7] 1 Collyer 370 (1844).

veyance of the property. If the conveyance was enjoined, that was an end of the matter. But the Vice-Chancellor discussed the power of the majority to make a surrender, and was of opinion (he was careful to say that he was merely stating his first impressions) that the majority had no such power.

But this opinion was not based on the ground that the majority of the members of a corporation did not, at common law, have power to surrender its charter. It was based solely on the ground that the provisions in the charter of that particular corporation were so framed that the majority had no such power. We may assume that his construction of those provisions was correct; but, even so, it is obvious that his decision has no bearing upon the question before us.

The English courts have had occasion to consider (*a*) corporations created by royal charter; (*b*) corporations created by special act of Parliament; and (*c*) corporations created under general laws passed by Parliament.[8] Corporations created by royal charter are spoken of as corporations at common law; corporations created by special act or under general laws are spoken of as statutory corporations.[9] It is doubtful if a corporation created by special act could be dissolved except by statute.[10] The general laws permit-

[8] This enumeration of the ways in which corporations may be created is not complete. Thus Blackstone says that there may be a corporation by prescription, "such as the city of London, and many others, which have existed as corporations, time whereof the memory of man runneth not to the contrary; and therefore are looked upon in law to be well created." COMMENTARIES, Book I, c. XVIII.

Thus too there is an ancient doctrine that some corporations exist by force of the common law alone — for example, church wardens were recognized by the courts as a legal unit for some purposes although they were uncharted. See BLACKSTONE, COMMENTARIES, Book I, c. XVIII; Conservators of River Tone *v.* Ash, 10 B. & C. 349, 383 (1829); WARREN, CASES ON CORPORATIONS, 2 ed., p. 3, note. There is some danger of confusion in the use of the expression "corporation at common law." It might well be used to indicate corporations which exist by force of the common law alone. But the English courts (as is stated in the text) have come to use it to indicate chartered corporations, as distinguished from statutory corporations.

The consideration of the authorities as to corporations by prescription and corporations which exist by force of the common law alone yielded nothing of value for the purposes of this article; and mention of them is therefore made only in a note.

[9] See Riche *v.* Ashbury Railway Carriage Co., L. R. 9 Exch. 224, 264 (1874); British South Africa Co. *v.* De Beers Mines Ltd., [1910] 1 Ch. 354.

[10] See LINDLEY, COMPANIES, 6 ed., 822. But *cf.* the general language used by Blackstone as to the ways in which "a" corporation may be dissolved.

ting the formation of corporations have express provisions giving the holders of three fourths of the shares of any corporation formed thereunder power to bring about its voluntary dissolution.[11]

The important fact for us from the English law is this: a chartered corporation, commonly called a corporation at the common law, had power to surrender its franchise to the Crown; and (in the absence of provisions to the contrary in the charter or by-laws or by statute) this power, like all other corporate powers, was vested by the common law in the members, and the decision of the majority of the members as to the exercise of this power bound the minority and was the decision of the corporation.

Since the Revolution corporations have been created in the United States only by the legislatures of the several jurisdictions.[12] The executives have no power to grant charters of incorporation. We have nothing to correspond to the chartered corporations of England. Our corporations are statutory corporations (although, as a question of language, it is usual to speak of a special act by which a corporation is created as its charter). Until the middle of the eighteenth century general laws for the formation of corporations were rare. Therefore, in our early law, the courts had occasion to consider only corporations created by special act.

Did a corporation created by special act have capacity or power to dissolve itself by its voluntary action? It did not. The consent of the legislature which had created the corporation was a condition precedent to its dissolution. Thus a corporation was not dissolved, even if it ceased to do business, disposed of all its property, and notified the executive department of the government that the charter was surrendered.[13]

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[11] This is a very rough summary. For the precise provisions, see Companies (Consolidation) Act, 1908, §§ 69, 182.

[12] The only qualifications to be made to this statement are (1) that there are some traces in our law of the ancient doctrine that corporations may exist by force of the common law alone (see Terrett *v.* Taylor, 9 Cranch. (U. S.) 43, 46 (1815); The Governor *v.* Allen, 8 Humph. (Tenn.) 176 (1847)); and (2) that some judges, in what seems to the writer to be an unconscious revival of this doctrine, have held that a court might properly treat some associations as legal units, although there was no legislative authority therefor. See the opinion of O'Brien, J., in Hibbs *v.* Brown, 190 N. Y. 167, 184, 82 N. E. 1108 (1907). Neither of these qualifications is important for the purposes of this article.

[13] Revere *v.* Boston Copper Co., 15 Pick. (Mass.) 351 (1834). For further authori-

If the legislature consented, that consent would be expressed by a statute. As a practical matter, if a corporation desired to be dissolved, it would procure the passage of a statute dissolving it. Until general laws permitting voluntary dissolution were passed, that was the only method by which corporations in this country could be voluntarily dissolved.

An act of Parliament dissolving a corporation is effective, without more. But with us, under the doctrine of the Dartmouth College case, it was not effective unless the corporation accepted the act (or the state had reserved power to repeal).

It is clear that a corporation created by special act had the capacity or power to accept a subsequent act by which it was dissolved. A corporation created by a legislature has such capacities or powers as the legislature intended it to have; and it may fairly be inferred that the legislature intended it to have power to accept acts which the legislature might subsequently pass respecting it.[14]

Therefore the question becomes: by what human beings was the corporate power to accept a repealing act to be exercised?

All that has been said above as to the power of a majority of the members of a chartered corporation to surrender its franchise is

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ties that the consent of the legislature was necessary, see Enfield Toll Bridge Co. *v.* Connecticut River Co., 7 Conn. 28, 45 (1828); Mechanics' Bank *v.* Heard, 37 Ga. 401 (1867); Economy Ass'n. *v.* Paris Ice Mfg. Co., 113 Ky. 246, 254, 68 S. W. 21 (1902); Curien *v.* Santini, 16 La. Ann. 27 (1861); Boston Glass Manufactory *v.* Langdon, 24 Pick. (Mass.) 49 (1834); Town *v.* Bank of River Raisin, 2 Doug. (Mich.) 530, 538 (1847); Campbell *v.* Mississippi Union Bank, 7 Miss. 625, 681 (1842); Lake Ontario Bank *v.* Onondaga Bank, 7 Hun (N. Y.) 549 (1876); Norris *v.* Smithville, 1 Swan (Tenn.) 164 (1851).

The cases of Slee *v.* Bloom, 19 Johns. (N. Y.) 456 (1821), and Penniman *v.* Briggs, 1 Hopk. (N. Y.) 300 (1824), are not *contra* to the text. They turned upon the interpretation of a statute, and held that, for the sake of the remedy given to creditors by that statute, a cessation of business and transfer of all property might be deemed to be what the legislature had in mind when it spoke of "dissolution."

[14] Mobile & Ohio R. R. Co. *v.* State, 29 Ala. 573, 586 (1857); Mechanics' Bank *v.* Heard, 37 Ga. 401 (1867); Portland Co. *v.* Portland, 12 Mon. B. (Ky.) 77, 79; Revere *v.* Boston Copper Co., 15 Pick. (Mass.) 351, 360 (1834); Town *v.* Bank of River Raisin, 2 Doug. (Mich.) 530, 538 (1847); Wilson *v.* Proprietors of Central Bridge, 9 R. I. 590 (1870); Attorney-General *v.* Society, 10 Rich. Eq. (S. C.) 604, 608 (1859); Mumma *v.* The Potomac Company, 8 Pet. 281, 287 (1834).

Of course where a corporation petitions for an act dissolving it, and such act is passed, the corporation is bound thereby, quite as much as if a formal acceptance were made after the passage of the act.

here pertinent. The principle that, unless other provisions are made by statute or by the agreement of the members, all corporate powers are vested in the members, and that a decision of the majority binds the minority and is the decision of the corporation, is a principle as fundamental in the law of statutory corporations as in the law of chartered corporations.[15]

It follows that, at common law, a decision of a majority of the members of a corporation to accept an act dissolving it binds the minority and is the decision of the corporation.

Reference is made to the following authorities, which are stated in chronological order (except that cases in the same jurisdiction are grouped):

Smith v. *Smith.*[16] The legislature had incorporated a Grand Lodge of Masons and the subordinate lodges composing the same. The Grand Lodge assumed to surrender the charter. The court was of opinion that the Grand Lodge was only one of the component parts of the corporation, that the subordinate lodges were also component parts, and that as *a majority* of those lodges had not assented to the surrender, the surrender by the Grand Lodge was not a corporate act.

> "Doubtless when the whole body of a corporation chooses to surrender its rights, it is at liberty to do so, and it will be valid; but *a majority must concur who have an interest or a right* (italics ours). The officers of a corporation, or an integral portion of it . . . are not the corporation, they have no right to make the surrender." [17]

We are all familiar with the fact that to-day, by statute or agreement of the corporate members, the powers of a corporation are usually vested in directors (the successors of a managing committee from the members); but that, even where there are grants of powers to directors in very broad terms, the courts incline to hold that it was the intent to give directors only powers of ordinary management and that it was not the intent to take from the members the power to decide on "fundamental" matters. *Chicago City Railway Co.* v. *Allerton.*[18] And doubtless the power voluntarily to dissolve the corporation would not be held to be in directors, unless there were

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[15] This principle is universally conceded, and the citation of authorities seems unnecessary.

[16] 3 Desaus. 557 (1813).

[17] Pages 576–77.

[18] 18 Wall. 233 (1873).

very clear and express provisions to that effect. *Jones* v. *Bank of Leadville.*[19]

Now *Smith* v. *Smith* has been cited as authority for the proposition that a corporation cannot at common law be dissolved except by the unanimous consent of its members. But it is not an authority for that proposition, and, indeed, may fairly be cited as a *dictum* against it. When the court said that "the whole body" must consent, it referred to the body made up of all the lodges, grand and subordinate; it was simply deciding that the action of the Grand Lodge did not bind the other lodges. It was analogous to a decision that, not simply the stockholders who are directors, but the "whole body" of stockholders must decide whether there is to be a surrender. But if that "whole body" acted, the court shows plainly that it considered that a decision of a majority of its members would be the decision of the corporation.

In *Town* v. *Bank of River Raisin,*[20] the court said that "a resolution to surrender by the great body of the corporation," assented to by the legislature, would dissolve the corporation.

Mobile & Ohio R. R. Co. v. *State.*[21] The court decided that it was constitutional for a legislature to require a corporation, as a condition precedent to securing the extension of a loan from the state, to consent in advance to a forfeiture of its charter in case of default. It said, p. 586:

> "The authorities do not sustain the proposition that there is no power in a corporation to consent to a destruction of the corporate life by forfeiture or surrender. It may be that such a consent could not be given by a majority of the corporators, and the authorities seem to go to that extent."

The court cited two cases for this statement. One case was *Ward* v. *Society of Attornies*, which we have already seen is, at most, only an authority that the majority may not surrender the charter if it appears from the provisions of the particular charter that they were not intended to have such power. The other case was *New Orleans R.R. Co.* v. *Harris,*[22] in which the court decided that a stockholder in one corporation cannot be made a stockholder in

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[19] 10 Colo. 464, 17 Pac. 272 (1887).

[20] 2 Doug. 530, 538 (1847).

[21] 29 Ala. 573 (1857).

[22] 27 Miss. 517 (1854).

another corporation without his consent, and in which there is not even a *dictum* on the subject of dissolution.

Lauman v. *Lebanon Valley R. R. Co.*[23] The court considered whether, treating a sale of all the corporate property as equivalent to a dissolution of the corporation, a minority stockholder could prevent it, and decided that he could not.

"It is of the nature of his contract with his associates, by which, under legislative authority, they constituted themselves into a corporation that it is dissoluble."

The power of dissolution is in the majority,

"and without it one member of a corporation would, under some circumstances, have an almost absolute power over the investments of all the others."

Polar Star Lodge v. *Polar Star Lodge.*[24] The Grand Lodge of Masons had authority to grant charters to subordinate lodges, and, by force of the statute, such lodges thereupon became corporations, the corporate existence to continue so long as such lodges remained under the jurisdiction of the Grand Lodge. A majority of the members of a subordinate lodge, X, formed another corporation, Y, and assumed to donate the property of X to Y. The court, at the instance of the minority, upset this donation. In the opinion there is this *dictum*, p. 76:

"There is no doubt of the right of individual members to withdraw themselves from the lodge and from the jurisdiction of the Grand Lodge. And doubtless the whole of the members might do the same thing by their unanimous resolution. But so long as a sufficient number of members to represent and continue the corporation exists, it does not appear to us to be within the power of the majority to dissolve the corporation."

Trisconi v. *Winship.*[25] A minority stockholder complained because the majority had suspended the operations of the company, and voted to liquidate. The court held that he had no ground for complaint.

"Section 687 of the Revised Statutes expressly authorizes three-fourths of the stockholders of a corporation to dissolve it altogether. . . . In the absence of any express statutory prohibition, a majority of the stockholders may wind it up, for reasons by them deemed sufficient."

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[23] 30 Pa. 42, 46, 47 (1858).

[24] 16 La. Ann. 53 (1861).

[25] 43 La. Ann. 45, 49, 9 So. 29 (1891).

Pringle v. *Construction Co.*[26] The court said:

> "It is a fundamental principle that in a corporation organized for the exclusive benefit of the corporators, or stockholders, the majority of the members may, in their discretion, wind up its business whenever they deem this step to be in the interests of the whole association."

Considering all the Louisiana cases, it is fair to say that the court has not given sanction to the proposition that, at common law, a corporation cannot be dissolved except by the unanimous consent of its members. With regard to business corporations, the opinion of the court is expressed to the contrary.

Abbot v. *American Hard Rubber Co.*[27] The court decided that a certain transfer of corporate assets could not stand. In the course of the opinion it said:

> "It is certain that the officers could not directly, and without the assent of the great body of the society, dissolve it; and a majority of the stockholders could not do it, against the dissent of the minority."

In support of this statement, it cites the cases of *Smith* v. *Smith* and *Ward* v. *Society of Attornies*, which we have already seen do not justify any such statement.

Wilson v. *Proprietors of Central Bridge.*[28] A majority of the members of a corporation voted to surrender its franchise, and the court decided, over the protest of a minority stockholder, that they had the power to make the surrender. The court considered *Smith* v. *Smith* and *Ward* v. *Society of Attornies*, and concluded that there was no authority, in cases or textbooks, that a surrender cannot legally be made, except by unanimous consent.

Black v. *Delaware Canal Co.*[29] The court said:

> "Such a radical change as the abandonment of business cannot generally be effected by directors; their duty in most charters is to manage and conduct the business. It requires the action of the corporators themselves. In corporations where there is no provision to the contrary in the charter, the rule is that the majority governs. The assent of all is therefore not required."

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[26] 49 La. Ann. 301, 303, 21 So. 515 (1897).
[27] 33 Barb. (N. Y.) 578, 591 (1861).
[28] 9 R. I. 590 (1870).
[29] 22 N. J. Eq. 130, 407 (1871).

Nothing is said as to dissolution of the corporation, but it may fairly be inferred that the court would have held that the majority had a right to surrender the corporate franchise.

Hancock v. *Holbrook*.[30] The court said, p. 358:

"At the common law the right of the majority of the stock to control the operations and winding-up of corporations like this [business corporations], not of a public character, is undoubted."

Barton v. *Enterprise Loan Association*.[31] The articles of association provided that

"this association shall continue in operation eight years, unless the funds of the association shall be sufficient to pay all its debts and to redeem all its stock in a shorter time."

The court held, of course, that this provision must be respected by the majority.

Parker v. *Bethel Hotel Co.*[32]

"An ordinary business corporation, where its charter specifies no definite time for its continuance, may sell its property and wind up its affairs, whenever a majority of the stockholders may deem it advisable."

State v. *Woolen Mills Co.*[33] A corporation, X, was formed, and nearly all its stock was subscribed. Another corporation, Y, which would be hurt by the competition of X, offered to let the stockholders of X become stockholders of Y if they would not proceed with their own undertaking. The offer was open to all the stockholders of X. The majority (272 shares) over the protest of the minority (184 shares) voted to dissolve X, and this action was brought to obtain a declaration that the corporation was dissolved. The court so declared.

"We think there can be no doubt that the majority of the stockholders have the right to control the corporation, provided they act in good faith; that is, without any attempt to take advantage of the minority for the benefit of the majority." [34]

The court further said,[35] that it thought this was a general rule, and that such rule was particularly applicable in the circumstances of the case, where the business of the corporation had not begun.

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[30] 9 Fed. 353, 358 (1881).

[31] 114 Ind. 226, 16 N. E. 486 (1887).

[32] 96 Tenn. 252, 273, 34 S. W. 209 (1895).

[33] 115 Tenn. 266, 89 S. W. 741 (1905).

[34] Page 272.

[35] Page 275.

From this review of the authorities it is seen that there are three decisions, *Lauman* v. *Labanon Valley R. R. Co.*,[36] *Wilson* v. *Proprietors of Central Bridge*,[37] and *State* v. *Woolen Mills Co.*,[38] that at common law the majority of the members of a corporation have a right to consent to the dissolution of the corporation, and that their consent binds the minority, and is the consent of the corporation. There are no decisions to the contrary. While there are *dicta* both with and against the decisions, the weight of the *dicta* is with the decisions; and the *dicta* against the decisions show on their faces that they were made from misapprehension of such cases as *Ward* v. *Society of Attornies*[39] and *Smith* v. *Smith.*[40]

The general rule at common law is that (apart from some agreement of the members to the contrary) *all* corporate powers are vested in the members of the corporation, and that a decision of the majority as to the exercise of such power binds the minority. There is no exception to such general rule with respect to the power of consenting to a dissolution.

We thus conclude our consideration of the question whether it is a rule of the common law that corporate consent to dissolution can be established only where all the members consent. The answer to that question is: No.

We have in terms considered above only the question of the dissolution of a corporation created by special act. This seemed desirable both because the question of dissolution first arose as to such corporations, and because general laws providing for the formation of corporations usually provide also for their dissolution. But if a corporation were formed under a general law, and the common law of dissolution remained, the dissolution of such corporation would be governed by the same principles as are applicable to a corporation created by special act. Thus, for example, in *State* v. *Woolen Mills Co.*[41] the corporation was formed under a general law.

In the several states of the United States there are now express statutory provisions respecting the voluntary dissolution of corporations. The state consents to accept the surrender on terms.

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[36] 30 Pa. 42 (1858).

[37] 9 R. I. 590 (1870).

[38] 115 Tenn. 266, 89 S. W. 741 (1905).

[39] 1 Collyer 370 (1844).

[40] 3 Desaus. 557 (1813).

[41] 115 Tenn. 266, 89 S. W. 741 (1905).

There is no uniformity in these statutes, but the following classification may be made:

In Indiana, Iowa, and Ohio it is provided that the dissolution may only be by the unanimous consent of the members.[42]

In Florida, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, New Hampshire, Pennsylvania, Rhode Island, and Vermont it lies in the discretion of a court to decree a dissolution. The matter may be brought before the court in various ways, usually by vote of a majority.[43]

In Alabama, Arkansas, California, Idaho, Montana, North Dakota, Oklahoma, South Dakota, Utah, and Washington a vote of the holders of a specified proportion of the stock is required, and the matter is then brought before the court for confirmation. But the statutes (if they may be taken at their language value) limit the function of the court to determining whether the provisions of the statutes have been complied with.[44]

In Arizona, Colorado, Connecticut, Delaware, Idaho, Illinois, Kansas, Kentucky, Louisiana, Nebraska, Nevada, New Jersey, New Mexico, New York, North Carolina, Oregon, South Carolina, Texas, Virginia, West Virginia, Wisconsin, and Wyoming a vote of the holders of a specified proportion of the stock is required, and there is no necessity of confirmatory court action.[45]

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[42] Indiana, BURNS, ANNOTATED STATUTES, § 5065; Iowa, CODE, § 1617 (but it may be otherwise provided in the articles); Ohio, PAGE & ADAMS, ANNOTATED GENERAL CODE, § 8741 (but see, as to buying out the minority, LAWS OF 1906, p. 229).

[43] Florida, COMPILED LAWS, 1914, § 2679 (majority); Maine, REVISED STATUTES OF 1904, c. 47, § 80 (majority); Maryland, LAWS OF 1908, (p. 45) c. 240, §§ 51, 52 (majority); Massachusetts, ACTS OF 1903, c. 437, § 51 (majority of each class of stock); Michigan, HOWELL, STATUTES, 1913, §§ 13560 *et seq.* (directors may petition court); Minnesota, GENERAL STATUTES, 1913, §§ 6636, 6637 (majority); Mississippi, CODE OF 1906, § 932 (two thirds); Missouri, REVISED STATUTES, § 2996 (two thirds); New Hampshire, PUBLIC STATUTES, 1901, c. 147, § 10 (one quarter may petition court); Pennsylvania, 1 PURDON, DIGEST, 818 (majority); Rhode Island, GENERAL LAWS, 1909, c. 213, § 27 (majority); Vermont, PUBLIC STATUTES, 1906, §§ 4281 *et seq.*

[44] Alabama, CODE OF 1907, § 3511 (two thirds); Arkansas, KIRBY, DIGEST OF STATUTES, § 954 (majority); California, CODE OF CIVIL PROCEDURE, § 1228 (two thirds); Idaho, REVISED CODES, §§ 5185 *et seq.* (two thirds); Montana, REVISED CODES, 1907, §§ 7323 *et seq.* (two thirds); North Dakota, Civil Code, COMPILED LAWS, 1913, § 4565 (two thirds); Oklahoma, REVISED LAWS, 1910, § 1270 (two thirds); South Dakota, Civil Code, COMPILED LAWS, 1913, § 446 (two thirds); Utah, COMPILED LAWS, 1907, §§ 3661 *et seq.* (two thirds); Washington, REMINGTON, CODE & STATUTES, 1915, § 3708 (two thirds).

[45] Arizona, Civil Code, REVISED STATUTES, 1913, § 2105 (majority); Colorado, MILLS, STATUTES, § 1031 (two thirds); Connecticut, LAWS OF 1903, c. 194, § 29 (three

In Georgia the statutes do not provide any method of voluntary dissolution.[46] In Tennessee the statute has been interpreted to give the court authority to declare a corporation dissolved, upon a surrender. But the statute is silent as to how the surrender may be made. Therefore the decision in *State* v. *Woolen Mills Co.*[47] (noted above) is a decision on how a surrender may be made at common law.

II

The members of a corporation may, of course, make any agreement they please among themselves (in the absence of statute) as to the time or mode of surrendering the corporate franchise. Such an agreement is not necessarily express; it may be implied if there be a proper basis for implication.

It has been said that there is an implied agreement between the members of every corporation organized for profit that, barring business disaster, there shall be no voluntary dissolution except by the unanimous consent of the members; and the case of *Natusch* v. *Irving* is cited in support of this statement. Our second inquiry is whether such statement is correct.

Persons who desire to associate for the conduct of a business undertaking may, by force of their own agreement, become partners; or they may obtain from the state the corporate franchise, in which case the undertaking is conducted by a legal unit distinct from the associates but controlled by them.

In the absence of any agreement between the partners to the contrary, each partner has, at common law, the right to bind all

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fourths); Delaware, REVISED CODE OF 1915, c. 65, § 39 (two thirds); Illinois, REVISED STATUTES, c. 32, 49 *b* (two thirds); Kansas, GENERAL STATUTES, § 1727 in connection with § 1714 (two thirds); Kentucky, CARROLL, STATUTES, 1915, § 561 (majority); Louisiana, ACT 267, 1914, § 28 (two thirds); Nebraska, REVISED STATUTES, 1913, § 575 (two thirds); Nevada, REVISED LAWS, 1912, § 1190 (two thirds); New Jersey, COMPILED STATUTES, 1910, Corporations, § 31 (two thirds); New Mexico, STATUTES, 1915, c. XXIII, § 36 (two thirds); New York, General Corporation Law (CONSOLIDATED LAWS OF 1909), § 221 (two thirds); North Carolina, STATUTES (PELL'S REVISAL, 1908), § 1195 (two thirds); Oregon, LORD, OREGON LAWS, 1910, § 6701 (majority); South Carolina, CIVIL CODE, 1912, § 2812 (majority); Texas, CIVIL STATUTES, 1911, art. 1205 (four fifths); Virginia, CODE, 1904, 1105 *a* (11) (two thirds); West Virginia, CODE (Hogg, 1913), § 2888 (majority); Wisconsin, STATUTES, 1911, 1789 (two thirds); Wyoming, COMPILED STATUTES, 1910, § 4242 (two thirds).

[46] See White *v.* Davis, 134 Ga. 274, 67 S. E. 716 (1910).

[47] 115 Tenn. 266, 89 S. W. 741 (1905).

the partners within the scope of the partnership business; and each partner has the right to dissolve the partnership.

In the absence of any agreement between the stockholders to the contrary, a single stockholder has, at common law, no such power to bind the corporation or to dissolve it as corresponds to the power of a single partner. The power to bind the corporation is in the majority of its members; the power to dissolve it (with the state's consent) is in the majority of the members.

In a partnership, any partner may dissolve. In a corporation, the majority may dissolve. If business associates were incorporated who would otherwise be partners, a court might conceivably have held that there was an implied agreement that dissolution should be regulated according to the common law of partnership; but a court could not rationally hold that there was an implied agreement that dissolution should be regulated in a manner unknown to the common law of corporations and unknown to the common law of partnerships.

The juxtaposition of the principle that any one member may dissolve, and the principle that a majority of the members may dissolve, cannot, in the nature of rational things, produce a principle that there shall be no dissolution except by the unanimous consent of the members.

Suppose there is an existing partnership, and the partners incorporate. Any one partner has now given up his right to force a dissolution; he has consented to abide by the judgment of the majority. But there is no basis for implying an agreement on his part that there shall be no dissolution unless all the stockholders agree.

The law has had occasion to consider joint-stock companies having transferable shares. These are large partnerships the organization of which is usually so molded as to produce without incorporation (so far as that is legally possible) facilities which approximate the facilities obtained through incorporation. May any member of a joint-stock company dissolve it? The courts might, within the bounds of reason, have held that there was a sufficient basis for implying an agreement that the question of dissolution should be decided as though the members were incorporated. But Lord Eldon, while he insisted that the member who desired dissolution should satisfy the common-law require-

ment of giving notice to all the partners, was of opinion that any member did have the partner right of bringing about a dissolution;[48] and in Massachusetts the court was of like opinion.[49] If the member of a joint-stock company retains his individual right to bring about a dissolution, and does not even subject himself to the will of the majority, is it proper to hold that a member of a business corporation has impliedly agreed that, even if he is one of a majority that desires to dissolve, the decision of such majority shall be subject to veto by any one of the minority?

It is also pertinent that the law has never been quick to imply agreements between partners varying the common law as to dissolution. In *Crawshay* v. *Manle*,[50] Lord Eldon said:

> "Without doubt, in the absence of express, there may be an implied contract as to the duration of a partnership; but I must contradict all authority if I say that wherever there is a partnership, the purchase of a leasehold interest of longer or shorter duration is a circumstance from which is to be inferred that the partnership shall continue so long as the lease. On that argument, the court holding that a lease for seven years is proof of a partnership for seven years, and a lease of fourteen of a partnership for fourteen years, must hold, that if the partners purchase in fee simple, there shall be a partnership forever."

Similarly, if the associates procure from the state a corporate franchise for a term of years or in perpetuity, this is simply a convenient instrument for the conduct of business and affords no proper basis for implying an agreement between the associates that this franchise is not to be surrendered except by unanimous consent.

The fact of accepting a franchise which may at the common law be surrendered by the majority cannot be a proper basis for implying an agreement that it shall not be surrendered except by unanimous consent.

We turn now to the case of *Natusch* v. *Irving*.[51] A prospectus was issued for the formation of an unincorporated company to grant fire and life insurance, with a capital divided into fifty thousand shares. Plaintiff subscribed for fifteen shares, paid the re-

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[48] See Van Sandau *v.* Moore, 1 Russ. 441, 463 (1826); LINDLEY, COMPANIES, 6 ed., 820.

[49] See Tyrrell *v.* Washburn, 6 All. (Mass.) 466, 474 (1863).

[50] 1 Swanst. 495, 508 (1818).

[51] GOW, LAW OF PARTNERSHIP. 3 ed., Appendix, Item No. VI.

quired deposit, insured his life in the company, paid the insurance premium, and was willing to execute a proper deed of settlement. The majority of the members then undertook to carry on the additional business of marine insurance. The directors informed plaintiff that, if he was dissatisfied with the course the majority proposed to pursue, he might receive back his deposit and interest, and also have his life-insurance policy canceled and the premium returned. The plaintiff thereupon filed his bill against the president and directors for an injunction to restrain them from carrying on the business of marine insurance in the name or on the account of the company and from applying the capital of the company to any such purpose. Lord Eldon granted the injunction.

Here a minority shareholder was allowed to block the majority. Why? The associates had agreed upon a defined business venture. The plaintiff had consented to participate in that defined venture — he had not consented to participate in any ventures the majority might determine. He could not be embarked upon a strange venture; he could not be made a shareholder in a company having different purposes from those to which he had agreed.

No one questions the soundness of this decision. *Natusch* v. *Irving* was the case of an unincorporated company, but the principle is applicable to members of an incorporated company and has repeatedly been so applied.

The decision is that the company cannot proceed to accomplish purposes different from the original purposes without the unanimous consent of the members. It is sometimes cited as though the decision was that the company must proceed to accomplish the original purposes until there is unanimous consent to stop. This is a grave misapprehension.

What can be done in such a situation? The minority can prevent the majority from proceeding to accomplish the different purposes. But if the majority believe that it is not wise to proceed further under the original plan, they may dissolve the company and liquidate its affairs. This will put them to considerable expense and trouble. They cannot simply determine, by their own appraisal, how much the plaintiff shall receive on such liquidation and rid themselves of him by paying him such amount. He has a right to insist that the liquidation proceed according to law. But that is the extent of his right.

It is plain that this was the way the matter lay in Lord Eldon's mind. A misapprehension of this case is so fatal to proper answers to the questions considered by this article that the pertinent parts of the opinion will be given in full (italics ours).

"An offer is made to the plaintiff that he may receive back his deposit with interest from the date of the payment, and he is desired to consider himself as having received notice thereof. But it is not, I apprehend, competent to any number of persons in a partnership (unless they show a contract rendering it competent to them) formed for specified purposes, if they propose to form a partnership for very different purposes, to effect that formation by calling upon some of their partners to receive their subscribed capital and interest and quit the concern; and, in effect, merely by compelling them to retire upon such terms, so to form a new company. This would as to partnership be a most dangerous doctrine. Where a partnership is dissolved (even where it can be in a sense dissolved the instant after notice to dissolve is given) *it must still continue for the purpose of winding up its affairs, of taking and settling all its accounts, and converting all the property, means and assets of the partnership existing at the time of the dissolution, as beneficially as may be for the benefit of all who were partners, according to their respective shares and interests; and the other partners cannot say to him, to whom they have given an offer of his deposit and interest, 'Take that, and we are a new company,' keeping the effects, means, assets and property of the old, as the property of the new partnership.*

"The company will indemnify the plaintiff against loss by its transactions already had, or hereafter to be had, not for the specified purposes of the institution. But the right of a partner is to hold to the specified purposes his partners, *whilst the partnership continues,* and not to rest upon indemnities with respect to what he has not contracted to engage in.

"A dissatisfied partner may sell his shares for double what he originally gave for them. But he cannot be compelled to part with them for that reason; it may be his principal reason for keeping them, having the partnership concern carried on according to the contract. The original contract and the *loss which his partners would suffer by a dissolution* is his security that it shall be so carried on for him and them beneficially, and with augmented improvement in the value of his shares and their shares." [52]

In a word, the minority shareholder can say to the majority: "Proceed under the original plan, or dissolve." This is an entirely

[52] Pages 404–05.

different proposition from permitting him to say to the majority: "Proceed under the original plan until I say the word to quit."

III

We return to the first case put at the opening of the article. A corporation, X, has sufficient liquid assets to meet its obligations as they mature, and is making large net profits. An offer is made by Y to purchase its assets. The directors, and the holders of a large majority of its stock, vote to accept the offer. Should a court, in a suit by a minority stockholder, enjoin the proposed transfer of assets?

The courts have sometimes reasoned thus: at common law a corporation may not be dissolved without the unanimous consent of its members; a transfer of all the assets is equivalent to dissolution; therefore at common law a corporation may not transfer all its assets without the unanimous consent of its members.

Of course a surrender of the corporate franchise and a transfer of all its assets are different things, and there is authority for the proposition that, although by statute a corporation may not be dissolved except by unanimous consent of its members, nevertheless a majority may transfer all its assets.[53] But no conclusion reached in this article is dependent on this distinction, — we will assume that a surrender of the corporate franchise and a transfer of all its assets are so closely associated that they should be governed by the same rules.

At common law the surrender may be made on a vote of the majority of the members; then the transfer may be made by like vote.

The power of the majority to transfer corporate assets was considered in *Treadwell* v. *Salisbury Mfg. Co.*[54] The plaintiffs, as trustees, held stock in the Salisbury Manufacturing Company, a corporation. A majority of the stockholders voted to authorize the directors to sell, at public or private sale, all the property of the corporation connected with the manufacture of goods providing, "that in case a sale be made to a new company, provision shall be made that the stockholders in this company, at the time of such sale, shall

[53] Beidenkopf *v.* Insurance Co., 160 Iowa 629, 142 N. W. 434 (1913). See also Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393, 406 (1856).

[54] 7 Gray (Mass.) 393 (1856).

have a right to take an interest in the new one, in proportion to their respective interests in this." The plaintiffs averred that the directors proposed to sell such property, at private sale, to a new corporation composed mainly of the members of the old corporation, for $250,000 payable in stock of the new corporation, and that this stock was to be divided among the stockholders of the old corporation.

The court seems to have accepted the contentions of the defendants as to the financial condition of the corporation. It was solvent; it could pay its debts and have a surplus "if prudently and discreetly conducted"; but a large amount of additional capital was needed for the successful prosecution of the business; the old corporation had great difficulty in procuring money; the proposed arrangement was, in the judgment of the directors, "the only proper and feasible course," and, if it were not adopted, the corporation "must stop business." [55]

The court said:

"We entertain no doubt of the right of a corporation, established solely for trading and manufacturing purposes, by a vote of the majority of their stockholders, to wind up their affairs and close their business if in the exercise of a sound discretion they deem it expedient so to do. At common law, the right of corporations, acting by a majority of their stockholders, to sell their property is absolute, and is not limited as to objects, circumstances, or quantity." [56]

The court also said:

"By accepting a charter, they do not undertake to carry on the business for which they are incorporated, indefinitely, and without any regard to the condition of their corporate property. . . . Upon the facts found in the case before us, we see no reason to doubt that the vote of the majority of the stockholders, for the sale of the corporate property, and the closing of the business of the corporation, was justified by the condition of their affairs." [57]

This case has frequently been cited as establishing the proposition that the holders of a majority of the stock may cause the corporate assets to be transferred if the corporation is in financial embarrassment. But the court expressed its opinion in favor of the large proposition that the majority could transfer all the cor-

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[55] Pages 397–98. [56] Page 404. [57] Pages 404, 405.

porate assets whenever they deemed it expedient to do so. The majority must act fairly toward the minority; it is pertinent to inquire if the majority have any legitimate business reasons for making the transfer; in its examination of the facts, the court found there was a legitimate business reason. This opinion cannot justly be interpreted as stating that a majority may cause the corporate assets to be transferred *only* in case the corporation is financially embarrassed. Such embarrassment may be a legitimate reason for the transfer; but there may be legitimate reasons unconnected with financial embarrassment.

Shortly before the Treadwell case, *Kean* v. *Johnson* [58] had been decided. The legislature of New Jersey authorized X, a railroad corporation, to purchase the road of Y, another railroad corporation. X took a conveyance authorized by the holders of a majority of the stock of Y. A dissenting stockholder of Y prayed that this conveyance be upset. As the Chancellor had been concerned in the cause as counsel, the matter was referred to a master, who advised that a demurrer to the bill should be overruled.

One possible interpretation of the master's report is that he was of opinion that as Y was a public-service corporation, its assets could not be transferred without the consent of the state; that the state could condition its assent in any way it saw fit; and that a proper construction of the legislative act showed that the legislature authorized the transfer only if all the stockholders of Y assented.

But the master's report may be interpreted as expressing the opinion that the legislature intended the sale to be made only if the rights of the stockholders, whatever they were by agreement between themselves, were respected; and that by agreement between themselves a sale of the assets of Y was not to be made, so long as it was prosperous, except by the unanimous consent of its members. We will adopt this interpretation of the report.

If, the master said, the stockholders

> "had any right as partners or beneficiaries, it would seem to be this, that their money should be devoted to that use, and never employed in any other, *nor returned to them before they desire it*." [59] (Italics ours.)

"The mere statement of the proposition," said the master, seemed to him to prove it. But, with deference to the learned

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[58] 9 N. J. Eq. (1 Stockton) 401 (1853).

[59] Page 408.

master, it must be said that he treated as the same two things which are radically different.

If associates have contributed their money for the prosecution of one enterprise, of course the majority cannot vary that enterprise. If a stockholder has invested his money in a corporation authorized to run a railroad from A to B, the majority have no authority to vary the enterprise so that the railroad shall run from A to C. And if there is one corporation, Y, authorized to run a railroad from A to B, and another corporation, X, authorized to run a railroad from B to C, the majority of Y have no authority to consolidate the assets and stocks of X and Y, so that a person who consented to become a stockholder in Y shall find himself a stockholder in the consolidated corporation.

But it is a radically different matter to hold that, if persons become the stockholders of a corporation, Y, authorized to run a railroad from A to B, and the holders of a majority of the stock come to believe, for legitimate business reasons, that it is wise to sell the corporate assets, nevertheless a minority stockholder shall have the right to compel them to continue with the enterprise, until he desires the return of his money invested in the enterprise.

If, said the master, the majority may sell the corporate assets when they see what they deem to be a better investment for their money, the minority must either join in the new enterprise "or take back their money to lie profitless on their hands, until they find another investment." [60] The master apparently regarded this as a great evil, and thought any such rule of law would deter persons from making corporate investments. But if the matter is to be viewed from the point of view of public policy, consider the effect of the master's doctrine upon the majority. If the majority believe that it is wise, for business reasons which seem to them plain, to terminate the venture, any minority stockholder is (under this doctrine) entitled to say to them: "As a question of judgment, you may be right and I may be wrong; but I have a legal right to be wrong, and I propose to stand upon that right." The dread of being obliged at a future date to reinvest his money might have some slight effect upon deterring an investor from making a corporate investment; but the dread of being obliged to continue the enterprise indefinitely, even if the majority believed there

[60] Page 413.

were legitimate business reasons for ending it, would have a much greater effect in deterring corporate investments.

Moreover, a majority have a power at common law to surrender the corporate franchise. It cannot rationally be held that the transfer of the corporate assets requires any authorization in excess of that required for the surrender of the corporate franchise. Persons who become stockholders in a corporation must be taken to have contemplated that their affairs should be regulated by the common law, unless they show a contrary intent.

"The contract between the parties is," said the master, "that so long as the affairs of the corporation are prosperous, it shall go on unless all consent to the contrary." But what basis is there for such a *dictum?* If the corporation becomes insolvent, the sale of assets becomes a question affecting creditors rather than stockholders: why should the power of the majority of stockholders to make a sale arise only when that condition is approached? The legal right of the minority to insist upon his own judgment, though it be wrong, admittedly ceases when disaster approaches. It is not good sense to hold that he may insist upon his own judgment until disaster approaches.

All questions involving an exercise of business judgment to be decided by the stockholders are to be decided by a majority vote. When to stop is as much a question of business judgment as how to proceed.

Perpetuity or disaster. The doctrine of the master that the members are to be deemed to have agreed that the corporate enterprise should be continued forever, or until disaster approaches, finds no support in public policy, or in the common law, or in business sense.

In *Black* v. *Delaware Canal Co.*,[61] Chancellor Zabriskie strongly criticised this doctrine.

"There is no case that holds that a majority of corporators, when a time is not specified for which the enterprise must be continued, may not abandon the enterprise and sell out the property of the company. The dictum of Parker, Master, in *Kean* v. *Johnson*, is the only authority which I find in support of the doctrine. . . . Becoming incorporated for a specified object, without any specified time for the continuance

[61] 22 N. J. Eq. 130 (1871).

of the business, is no contract to continue it forever, any more than articles of partnership without stipulation as to time." [62]

The corporation involved in the litigation before the Chancellor was a prosperous corporation.

It is submitted that the holders of a majority of the stock of a corporation organized for profit have the power to cause a transfer of all the corporate assets and a distribution of the proceeds (after satisfying creditors) to the stockholders whenever, for legitimate business reasons, they deem such a course wise. Financial embarrassment is not the only legitimate business reason for such a transfer. If such a corporation is engaged in a public employment, the consent of the state to the transfer becomes necessary; but this is simply an additional requirement, and in no wise affects the relation of the majority of the stockholders toward the minority.

Some questions remain as to the mode of such transfer.

1. Each minority stockholder should receive in cash his fair proportion of the price paid for the corporate assets, if he desires cash. In the Treadwell case, the purchasing corporation was to pay nothing but stock; the selling corporation simply proposed to sell such shares as the minority were unwilling to receive and to give the proceeds of those shares to the minority. This strikes the writer as unfair. The corporate assets, as a whole, might have a market value of $250,000, but if this is paid in stock having a par value of $250,000, and some of that stock is then sold, it does not follow that this minority stock will bring par in cash — it probably will not. The price must be a fair price, and it should be computed on a cash basis. Then all stockholders may use their cash to make such new investments as they please. If the majority wish to use their cash to purchase stock in the purchasing corporation, it is proper for them to do so. Therefore it is proper for the purchasing corporation to give an option of its own stock instead of cash to those of the stockholders of the selling corporation who desire it.

In *Kean* v. *Johnson* no provision was made for the minority stockholder to receive anything but the stock of the purchasing corporation.

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[62] Pages 404–05.

2. The terms of the sale should not be more advantageous for the majority stockholders than for the minority. The majority must not, directly or indirectly, appropriate the corporate assets to themselves. Therefore if the purchasing corporation offers any option or right to the majority stockholders, it must offer such option or right to all the stockholders.

3. On the dissolution of a partnership, the court usually orders the partnership assets to be sold at public auction, unless all the partners have otherwise agreed. But the power of a single partner, we have already seen, is much greater than the power of a single stockholder. As the majority stockholders may determine whether the corporate assets are to be transferred, they should also determine on what terms the transfer is to be made. A specific offer is made for the corporate assets. The question is: should that offer be accepted? The majority should have power to close with the offer.

A prospective purchaser may be willing to pay a specified price, if the corporation will contract to convey for that price. But it by no means follows that he will be willing to make that offer at public auction when he is exposed to the competition of others.

It is common experience that sales at public auction are usually not so advantageous to the seller as private sales. The majority of the stockholders should not be stripped of the power of making a private sale.

If a minority stockholder questions the propriety of a private sale the court must inquire whether the price is a fair one — whether there is so great a chance that the property will bring more at a public sale than at this private sale that it should not abide by the judgment of the majority as to the mode of sale.

It is impossible within the scope of this article to discuss adequately all the authorities. In support of the opinion of the master in *Kean* v. *Johnson*, see *Abbot* v. *American Hard Rubber Co.*,[63] *People* v. *Ballard*,[64] *Forrester* v. *B. & M. Co.*,[65] *Theis* v. *Spokane Gas Co.*[66]

On the other hand, the reasoning of the court in the Treadwell case has often been approved, and in some recent cases the courts

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[63] 33 Barb. 578

[64] 134 N. Y. 269, 32 N. E. 54 (1892).

[65] 21 Mont. 544, 55 Pac. 229, 353 (1898).

[66] 34 Wash. 23, 74 Pac. 1004 (1904).

have recognized that the majority may cause all the assets of a corporation to be sold, even if the corporation is prosperous, and that the sale may be a private sale. See *Beidenkopf* v. *Insurance Co.*,[67] *Bowditch* v. *Jackson Co.*[68]

IV

We return to the second case put at the opening of this article. A corporation, X, formed in state R, has sufficient liquid assets to meet its obligations as they mature and is making large net profits. But its business is being transacted chiefly in state S, and both R and S are collecting large sums in taxes from it. The directors and the holders of a large majority of its stock wish to form a corporation, Y, in state S and transfer the assets of X to Y. If a minority stockholder objects, is there any way in which such object can be accomplished? The writer knows of no way in which this object can surely be accomplished; but if the suggestions made below are sound, the majority may either (1) accomplish this object, or (2) retire with the value of their shares in cash.

A transfer of the assets of X to Y at private sale should, it is submitted, be enjoined. X and Y are controlled by the same human beings — they are on both sides of the bargain. There are no two legal units dealing with each other at arms' length, each selfishly striving to make the best terms possible. To permit such private sale would be to permit the majority to appraise the corporate assets at their own figure and to give the minority stockholder only his share in the value of the assets as so appraised. In *Natusch* v. *Irving*, Lord Eldon said that it was not competent for a majority of partners, who proposed to form a new partnership on different terms, "to effect that formation by calling upon some of their partners to receive their subscribed capital and interest and quit the concern; and, in effect, merely by compelling them to retire upon such terms to form a new company." Such summary liquidation, at values fixed by the say-so of the majority, is not permissible. There must be a winding-up under the rules of law, and such winding-up must include "converting all the property, means and assets of the partnership existing at the time of dissolution, as beneficially as may be for the benefit of all who were partners."

[67] 160 Iowa 629, 142 N. W. 434 (1913). [68] 76 N. H. 351, 82 Atl. 1014 (1912).

The associates have disagreed. The minority believe that a further prosecution of the venture, under the original terms, is wise; the majority do not. Under these circumstances the majority have the right to say whether the venture, under the original terms, is to be terminated; but, if it is terminated, the minority as well as the majority must be given a chance to bid for the assets. The majority must take the risk of losing control of the assets. Therefore the sale must be at public auction. If Y wins the assets, it must be because Y has outbid all others at such a sale.

There are two other requirements which, it is submitted, the majority should satisfy.

First. If the assets are exposed to sale at public auction, there is danger that there will not be any active competition from any outsiders against the bidding by Y and that the minority stockholders will not have the means to make effective competition. The result would be that the assets would go for a low figure, and the minority stockholders would receive only their share of the small proceeds realized by the sale. If this were permitted, it would put the majority in a position to say to the minority: consent to the variation of the original agreement with us, or we will sell all the assets at auction, buy at a low figure, and you will have nothing but your share of the small proceeds. This would subject the minority to great pressure to consent to the variation of the original agreement. This could, and should, be prevented by fixing an upset price which the court (if the matter is tested) finds is the present value in cash of the assets, treated as the assets of a going concern.

Second. The minority (who waive the right to bid, or to be interested in any bid, adverse to the majority) should have the right to subscribe to the securities of Y on the same terms as those enjoyed by the majority.

Under these conditions the liquidation sale would be conducted in a manner entirely fair to the minority. If a shareholder desires it, he retires with the fair value of his share in cash. If he wants to go on with the new venture, on equal terms with the others, he stands no danger of being squeezed out. If he wants by himself or with associates to bid for the assets, that is open to him.

There are two cases which are sometimes spoken of by lawyers as holding that there can be no sale of the assets of a prosperous corporation to another corporation controlled by the majority — *Theis* v. *Spokane Gas Co.*[69] and *Riker & Son Co.* v. *United Drug Co.*[70]

In *Theis* v. *Spokane Gas Co.* three financial houses desired to purchase all the bonds and stock of a corporation. They purchased all the bonds and all the shares of stock except eight, but the holder of the eight refused to sell. By statute the holders of two thirds of the stock could institute proceedings for voluntary dissolution; if specified acts were done the statute provided that the court "must" decree dissolution. The holders of two thirds of the stock voted to sell the corporate assets, and they were sold at public auction to a representative of the majority; it was intended that he should transfer the assets to a new corporation, and that the owner of the eight shares should be excluded from any interest in the new corporation. The appellate court upset the transfer.

The writer cordially agrees with this result. It follows from what has been said above that such a transfer was made in a manner that was not fair to the minority stockholder.

But the court said many things which, it is submitted, are erroneous. "It is conceded," said the court, "that at common law a corporation had no power to dissolve except by universal consent of stockholders." In the first part of this article we carefully examined the common law on this point and found that, contrary to what the court here says, at common law the majority of the members had power to surrender the corporate franchise. This statement was made at the opening of its discussion of the law applicable to the case, — the court started with a conception fundamentally wrong.

The court quoted extensively from *Kean* v. *Johnson* and adopted the conception that the stockholders of a corporation impliedly agree with each other that the assets of the corporation shall not be sold, so long as it is prosperous, without unanimous consent. If one starts with the conception that the corporate franchise cannot be surrendered without the unanimous consent of the members, it is easy to adopt the second conception that the assets may not be transferred without unanimous consent. As, however, a majority of the members have a right at common law to surrender the

[69] 34 Wash. 23, 74 Pac. 1004 (1904). [70] 79 N. J. Eq. 580, 82 Atl. 930 (1911).

corporate franchise, it is not rational to imply an agreement between the members, from the mere acceptance by them of the corporate franchise, so surrenderable, that the assets shall be transferred only on unanimous consent.

The court concluded that the statute permitting voluntary dissolution should be taken to alter the common law only in a case where the business was to be discontinued. There must be disintegration, a discontinuance of the business to make it a dissolution "within the meaning of the statute."

This comes close to holding that the rights of the minority stockholders are, notwithstanding the statute, the same as they are at common law. It is submitted that such a construction was unjustified; but whether it was justified or not is not the main question which interests us. Assume it is proper to construe the statute as not (for the purpose in hand) altering the common law. The question remains: What was the common law? And the answer of the court to that question was wrong.

There is danger that *Theis* v. *Spokane Gas Co.* may be regarded as an authority that no dissolution is a *bonâ fide* dissolution unless there is a disintegration of the business.

Any such doctrine would be so destructive of values as to be very deplorable. All courts have heretofore concurred in holding that, certainly if the corporation were financially embarrassed, the majority may cause the corporate assets to be transferred. The very idea of such a transfer is to prevent disintegration and a discontinuance of the business. The assets are transferred with intent that the business shall be continued by another legal unit. The fact that the purchasing corporation is controlled by the majority in the selling corporation does not make the transfer objectionable.[71]

So where the assets of a prosperous corporation are transferred to an outside purchaser (the first case put in this article) they are of course transferred with intent that the business shall be continued by another legal unit.

Now if the assets of a prosperous corporation are bought in by the majority of the stockholders at a sale by public auction (under the safeguards suggested above), what ground is there for the

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[71] Treadwell *v.* Salisbury Mfg. Co., 7 Gray (Mass.) 393 (1856); Phillips *v.* Providence Steam Engine Co., 21 R. I. 302, 43 Atl. 598 (1899).

charge that this is not done in good faith? To use a term like "good faith" with a vague moral flourish is very unfair. The question whether the majority have acted properly depends on the answer to two specific questions. First, had they a right to cause the assets to be so offered for sale? Second, had they a right to bid at such sale?

The person to conduct the sale should be selected by the corporate officers. If there were any question of the independence of this person, no doubt the court would enjoin a sale until a proper person was selected. But this point presents no real practical difficulty. And if the sale is being properly conducted, it is submitted that there is no valid objection to any stockholder participating in the bidding. In sales of partnership property, on dissolution, the usual course is for all partners to have leave to bid.

Therefore we are remitted to the first question: Did the majority have a right to cause the assets to be offered for sale? Did the majority have the power to bring to a termination the conduct of the enterprise *by this corporation?* It is submitted that they did, and that their hope of resuming control of the assets through purchase at the sale and using those assets in what they believe will be a more advantageous manner carries with it no taint of impropriety. They have the control under present conditions; they are risking that control in the hope of getting better conditions.

In *Riker & Son Co.* v. *United Drug Co.*[72] the directors of the United Drug Company, a New Jersey corporation, were of opinion that it was desirable that all the assets of the New Jersey corporation should be transferred to a Massachusetts corporation formed primarily for the purpose of receiving such assets and continuing the business. The plan proposed that the assets should be paid for "by delivering to the holders of stock of the New Jersey corporation in exchange for that stock shares of the stock of the Massachusetts corporation."

The court treated this as amounting to a consolidation of the New Jersey corporation with the Massachusetts corporation; held that there was no authority for the consolidation of a New Jersey corporation with a foreign corporation; and enjoined the holding of a meeting of the stockholders to vote upon dissolving the New Jersey corporation as a part of this plan. (In New Jersey the

[72] 79 N. J. Eq. 580, 82 Atl. 930 (1911).

holders of two thirds of the stock may voluntarily dissolve the corporation.)

This plan was doubly objectionable. It was proposed to transfer the assets at private sale to a corporation which would be controlled by a majority of the old stockholders; and the consideration was to be the stock of the new corporation.

It is unlawful that a stockholder should, directly or indirectly, be embarked upon a venture different from that to which he agreed. If the assets and stocks of corporations X and Y are consolidated, so that a stockholder of X finds himself a stockholder in the consolidated corporation, he has been so embarked. If the assets of a New Jersey corporation are transferred to a Massachusetts corporation, and the stockholder in the New Jersey corporation finds that all he has is a right to stock in the Massachusetts corporation, he has been so embarked.

To this all would agree. But we find this language:

"The prime purpose of the scheme . . . is not the winding up of the New Jersey corporation and the distribution of its assets, or the proceeds of the sale thereof, among its stockholders, but the absorption of that company by the Massachusetts corporation, the transfer not only of its assets but of its business, to that corporation, and the future carrying on of that business by the Massachusetts corporation under the name of the defendant company. The scheme, in its essence, whatever it may be in form, is not a plan for the re-organization of the New Jersey company, nor even for the winding-up of its business and its dissolution within the meaning of the latter word as used by our Corporation act, but is a scheme for its merger into or consolidation with the Massachusetts corporation. . . . The scheme, in the carrying out of which the dissolution of the company is a proposed step, is a fraud upon the statute (the word is used in a legal, not a moral, sense)." [73]

Would the New Jersey court say that a sale at public auction, with the safeguards suggested above, was a fraud on the statute?

It is submitted that such a sale would not be a fraud on the statute, or on the minority stockholders. If, indeed, at common law a minority stockholder has the right that his money shall not be returned to him before he desires it, and the statute has not changed the common law, such a sale should be enjoined. But this rule, stated by the master in *Kean* v. *Johnson*, was repudiated in *Black* v. *Delaware Canal Co.*[74]

[73] Pages 582, 583.

[74] 22 N. J. Eq. 130 (1871).

That is the nub of the whole matter. If a minority stockholder has such a right, then he has a strangle hold. But if not, then while he may insist, on his side, that there be no variation in the terms of the undertaking by the corporation of which he is a member, the majority, on their side, may insist that the undertaking, as so conducted, be brought to a termination. The right of the minority that there shall be no change is balanced against the right of the majority that there may be a termination.

The right of the minority that there should be no change has always been clear, and conceded by everyone. The right of the majority to terminate has been clouded by misstatements and cumulative misconceptions. But the majority did have that right at common law. Nor has this been essentially altered by the statutes; the statutes may make, for example, two thirds necessary to a dissolution, where any majority was sufficient at common law; and it may be that such statutes should be construed to require that a sale made as a step preliminary to dissolution should be authorized in the same manner as a dissolution; but this is the extent of the statutory changes.

The right of the minority that there shall be no change while the corporation continues to conduct the undertaking must not be infringed, directly or indirectly. But the right of the majority to terminate the conduct of the undertaking by the corporation is entitled to equal respect, and must not be infringed, directly or indirectly.

This is a subject fit for a treatise. It would be interesting to speak of the lease of corporate assets; of the statutes that have been passed in some states giving the majority a right to purchase the shares of minority stockholders; of agreements that may be included in organization papers which will make plain the right of the majority to sell the corporate assets; and of the possibility of amending organization papers so as to introduce such agreements. But to speak of these matters would be to prolong this article to altogether undue length.

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